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No. 87-764

In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF FLORIDA,
Petitioner,

vs.

MICHAEL A. RILEY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

The question presented in Florida's petition for writ of certiorari was:

> Whether the Florida Supreme Court's holding—that ground observations from a helicopter at a lawful altitude of 400 feet over residential backyards violate reasonable expectations of privacy within the meaning of the Fourth Amendment—conflicts with *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

This question may be rephrased:

1. Whether this Court should decide that warrantless naked-eyed aerial observation is permissible under the Fourth Amendment so long as the police observer has the legal right to be in the place from which the observation is made.

2. Whether this Court should reject the rules suggested by the Florida Supreme Court as to warrantless naked-eye aerial observations that:

   - An observation from a fixed-wing aircraft in space where it may lawfully be is constitutional but an observation from a helicopter in space where it may lawfully be is not; and

   - An observation made on a casual patrol is constitutional but an observation made on a purposeful patrol "targeted" on specific marijuana cultivating operations is not.

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PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Florida Supreme Court (J.A. 110-139) is reported as *Riley v. State*, 511 So.2d 282 (Fla. 1987). The opinion of the Florida District Court of Appeal, Second District (J.A. 99-109), styled *State v. Riley*, is reported at 476 So.2d 1354 (Fla. 2d DCA 1985). The opinion of the Florida Circuit Court for Pasco County on pretrial motion to suppress (J.A. 92-98), styled *State v. Riley*, is not reported, but is reprinted verbatim in the body of the District Court's published opinion at 476 So.2d 1354, 1354-55.

JURISDICTION

This Court has jurisdiction to review the decision of the Florida Supreme Court on writ of certiorari under 28 U.S.C. § 1257(3). The decision of the Florida Supreme Court, quashing the decision of the Florida District Court of Appeal and remanding this case for reinstatement of the trial court's suppression order, was rendered on July 9, 1987. J.A. 110. After denial of its motion for rehearing, Florida filed a petition for a writ of certiorari, which this Court granted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment is applicable to the states by virtue of the Fourteenth Amendment to the United States Constitution. It provides, in part:

> Section 1 - No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article I, Section 12 of the Florida Constitution provides:

> SECTION 12. Searches and seizures. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

49 U.S.C. § 1301(29), relied upon by the Florida Supreme Court, provides:

> (29) "Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft.

14 C.F.R. § 91.79, relied upon by the Florida Supreme Court, provides:

> 91.79 Minimum safe altitude; general.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

(c) Over other than congested areas. An altitude of 500 feet above the surface except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

(d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to person or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the administrator.

STATEMENT OF THE CASE

The trial court made a succinct statement of facts, which the District Court of Appeal reprinted verbatim:

> The Defendant, MICHAEL RILEY, rented and occupied a parcel of property containing in excess of five (5) acres. A portion of this property contained a mobile home, occupied by the Defendant as a dwelling, and certain out-buildings. The property is located in a rural area and contained numerous trees and shrubs.
>
> The portion of the property containing the mobile home and out-buildings was enclosed or partially enclosed by a net wire fence. One of the photographs of the property depicts a "DO NOT ENTER" sign posted in an area in front of the mobile home.
>
> The major out-building is located about 10′ to 20′ to the rear of the mobile home. This building is enclosed on two sides. One of the remaining sides is open to an area of trees and shrubbery (within the fenced area) which obscure it from view, and the fourth side is screened by the mobile home and by one or more trees located between the greenhouse and the mobile home. The roof of the greenhouse is constructed of corrugated roofing, a portion of which is translucent and a portion of which is opaque. There are two openings in the roof which appear to be caused by either removing or not installing two of the corrugated roofing panels. The combined open space amounts to approximately one-tenth of the total roof area. The testimony before the Court indicates that the contents of this greenhouse were not visible from any adjacent property.

Deputy Kurt Gell of the Pasco County Sheriff's Office, acting upon information which had been received by another deputy, investigated the property for possible violation of statutes prohibiting cultivation of cannabis. The deputy and a pilot employed by the Pasco County Sheriff's Office approached the property by helicopter at an altitude of approximately 400 feet. As the helicopter approached the property, Deputy Gell, using a camera with a telephoto lens, took photographs of the mobile home and greenhouse. The evidence is unclear as to whether the helicopter descended below 400 feet, but it did circle over the greenhouse twice while the deputy observed the property. Deputy Gell testified that through the openings in the roof and through one or more of the open sides of the greenhouse, he could see and identify growing marijuana plants. At this point the deputy left the subject property and prepared an affidavit which was the basis for the issuance of a search warrant.

On August 16, 1984, pursuant to the execution of the search warrant, the evidence sought to be suppressed by the Defendant was seized. Said evidence included 44 marijuana plants found growing in the greenhouse.

J.A. 92-95, *reprinted in* J.A. 100-102.

Certain other facts (or the lack thereof) seem relevant, as may be gleaned from the minimal record.[1]

1. The record consists of the fifty-page transcript of the suppression hearing (J.A. 11-91) (much of it legal argument), at which only the deputy sheriff, Kurt Gell, and the defendant, Michael Riley, testified and documentary evidence consisting of a number of photographs (two of which were taken from the air, the balance being taken from the ground after a search warrant was obtained and executed).

a. Deputy Gell had over 14 years experience as a police officer, had observed marijuana as a police officer 100 times, and had in unrelated investigations observed marijuana in the course of aerial observations from airplanes or helicopters on approximately six prior occasions. J.A. 38.

b. The marijuana plants observed here were, in the words of the prosecutor, "at least the height of this greenhouse, [plants] approximately six to twelve *feet* tall." J.A. 78-79 (emphasis added). This statement is fully supported by the photographic exhibits. *See, e.g.*, Def. Ex. 6; State's Ex. 17.

c. As the trial court found, 10% of the top of the greenhouse was exposed to Deputy Gell's view, the opening apparently being caused by the conscious act of "removing or not installing" part of the roof. Furthermore, two of the four sides of the greenhouse were open to the air. J.A. 42-43, 93-94, 101.

d. As the District Court of Appeal noted, Deputy Sheriff Gell testified and the trial judge "specifically accepted as true the deputy's statement that he could see the marijuana plants from his position of aerial surveillance." J.A. 88, 104; *see* J.A. 24, 26, 29-31, 34. In other words, although the deputy took two aerial photographs using a camera with a telephoto lens, he could see these 6-12 foot plants with his naked eye.[2]

e. The only direct evidence of a subjective intention to conceal the marijuana cultivating operations was the "DO NOT ENTER" sign noted by the trial judge. Riley did not testify as to his subjective intent or desire.

2. The Florida Supreme Court noted this factual ruling. J.A. 113 n. 2.

The Florida courts inferred a subjective intent from the net wire fence around (or partially around) the mobile home and out-buildings, the enclosure of two sides, the partial obscuration of the other two sides, and the corrugated roofing of most of the top of the greenhouse.

f. Riley had an oral lease on the over five-acre tract. J.A. 47-48. After moving into the mobile home on the property, he himself built the greenhouse near the mobile home. *Id.*

g. There was no evidence as to the type of helicopter involved or its capacity to hover. In fact it did not hover, but instead, as the trial court found (J.A. 94-95), it circled the greenhouse twice. J.A. 32.

h. There was no evidence that Deputy Gell photographed any property but Riley's. None of the photographs shows anyone else's property (nor, considering the size and rural nature of the property, would that have been likely).

i. The Florida Supreme Court made four statements about aerial observation. None was based on any record evidence:

1. aerial surveillance is "more susceptible to abuse and invasion of privacy than ground surveillance. . . ." (J.A. 130);

2. helicopter surveillance is "particularly likely to unreasonably intrude upon private activities. . . ." (J.A. 130);

3. helicopters' "virtually unlimited maneuverability and operational capabilities" invade privacy (J.A. 131); and

4. those justices "do not believe" one could "as easily" see what was seen here from a fixed-wing aircraft as from a helicopter. J.A. 133.

Riley was charged by information on August 16, 1984 with two counts of violating Section 893.13, Florida Statutes (1983) (the unlawful manufacture and possession of marijuana). J.A. 3-6. Riley filed a motion to suppress evidence, asserting the warrantless aerial observation constituted a "search." J.A. 7-10.

Despite this rather simple and straightforward factual framework, the three Florida courts below reached exceedingly different legal conclusions.

The trial court, writing in December 1984, granted the motion to suppress (J.A. 91-98), holding Riley had "exhibited an actual and reasonable expectation of privacy in an area which is protected by the Fourth Amendment and the [Florida] Declaration of Rights." J.A. 95. The trial court further observed, "Clearly, the greenhouse is within the curtilage and is therefore a constitutionally protected area." J.A. 95-96. While concluding, "Defendant herein has manifested a reasonable expectation of privacy from aerial surveillance" (J.A. 96-97), the trial court expressly did "not reach the question of whether circling over the subject property at an altitude of 400 feet or less is in itself an invasion of a constitutionally protected area." *Id.*

The District Court of Appeal, writing in October 1985, unanimously reversed the trial court's suppression order. J.A. 99-109. Finding the Fourth Amendment aerial surveillance question to be one of great public importance, the District Court certified it to the Florida Supreme Court. Fla.R.App.P. 9.030(a)(2)(A)(v).

Neither the District Court's nor the trial court's decision, nor Riley's motion or briefs in these courts and the Florida Supreme Court, made any reference whatsoever to any federal "navigable airspace" statutory scheme or to any "minimum altitude" regulations. This was not an issue until the Florida Supreme Court spoke.

The Florida Supreme Court, writing in July 1987 (almost three years after the police aerial observation in question), unanimously quashed the District Court's decision and remanded with instructions to reinstate the trial court's suppression order.[3]

Unlike the lower Florida courts, the Florida Supreme Court discussed this Court's decisions, including in particular (i) Riley's reliance on *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (*"Katz"*), and (ii) this Court's two intervening Fourth Amendment decisions upholding warrantless aerial surveillance, *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) (*"Ciraolo"*), and *Dow Chemical Co. v. United States*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986) (*"Dow"*).

In the Florida Supreme Court's view, *Ciraolo* and *Dow*, far from vindicating Florida, demonstrated its viola-

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3. The decision below rested on the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution. J.A. 111. This section of the Florida Constitution requires that the search and seizure provisions of the Florida Constitution be construed in conformity with the Fourth Amendment to the United States Constitution as interpreted by this Court. Since Florida law is dependent upon the construction given the Fourth Amendment, this Court has power to review the judgment of the Florida Supreme Court under Article I, Section 12. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

tion of Riley's Fourth Amendment privacy rights because the police helicopter here—unlike the fixed-wing aircraft in those cases—had not been in "navigable airspace" as defined in the United States Code *in pari materia with* Federal Aviation Agency ("FAA") regulations (as interpreted by that court). For this holding, the Florida Supreme Court explicitly followed the intervening decision in *People v. Sabo*, 185 Cal. App. 3d 845, 230 Cal. Rptr. 170 (Cal. 4th Dist. Ct. App. 1986), *cert. denied sub nom. California v. Sabo*, ... U.S. ....., 107 S.Ct. 2200, 95 L.Ed.2d 855 (1987) (*"Sabo"*).[4] On the basis of *Sabo*, the Florida Supreme Court explained its decision in terms of "navigable airspace."

Explicitly following *Sabo* "under circumstances nearly identical to those here," (J.A. 131-32), the Florida Supreme Court concluded, citing no factual basis, "Although petitioner [Riley] may not have had a legitimate expectation that his greenhouse would not be viewed from a fixed-wing aircraft flying in navigable public airspace, we do not find unreasonable his expectation that its contents would not be examined from a helicopter hovering below 500 feet." J.A. 133-34. "Recognizing that the question in this case is a close one, . . ." (J.A. 137), the decision below nevertheless held, "In circling and descend-

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4. Recently another California appellate court reached the opposite conclusion from *Sabo* (and the Florida Supreme Court here) on virtually identical facts. *People v. Romo*, 198 Cal. App. 3d 581, 243 Cal. Rptr. 801 (Cal. 1st Dist. Ct. App. 1988), *pet. for review denied* (Cal. Apr. 27, 1988) (No. S004819) (*"Romo"*). Compounding the confusion, another division of the same appellate district that decided *Romo* followed *Sabo*. *People v. Roberts*, 195 Cal. App. 3d 479, 240 Cal. Rptr. 658 (Cal. 1st Dist. Ct. App. 1987). (This latter case, however, construed the California Constitution before its amendment by "Proposition 8").

ing below 'public navigable airspace,'[5] Detective Gell impermissibly invaded Riley's privacy and his observations thus constituted a search under the [F]ourth Amendment to the federal [C]onstitution and [A]rticle I, [S]ection 12 of the Florida Constitution." J.A. 137-38.

SUMMARY OF THE ARGUMENT

Florida, like most states,[6] is heavily dependent on use of aircraft to detect marijuana cultivating operations as the first step in their eradication. Florida draws no distinctions between types of aircraft used. Both fixed-wing aircraft and helicopters are utilized; both have their functions. In all cases, Florida intends that aircraft be operated lawfully under FAA regulations, that is, that they be piloted in areas where they legally may be. For fixed-wing aircraft this is in "navigable airspace" (1000 feet in urban, 500 feet in rural areas). For helicopters this is at less than the minimums of "navigable airspace," so long as without surface hazard to persons and property.

Florida submits that people today live in the constant presence of both fixed-wing aircraft and helicopters and can have no objectively reasonable expectation of privacy as to matters viewable by unaided vision from any aircraft

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5. The court stated the helicopter was not in public navigable airspace because it was below the minimum altitude level for fixed-wing aircraft. Based on the concern for technological advances expressed in *Katz*, *supra*, the Florida Supreme Court concluded that, even though the officers were in a place they had a right to be and made an observation that any member of the public in that space could have made, the observation by a helicopter flying at a lawful altitude violated Riley's Fourth Amendment right to privacy.

6. See State of Indiana's Brief on behalf of itself and 23 other states and commonwealths as *amici curiae* filed this week in this case.

positioned where it lawfully may be. Florida therefore asks that the decision below be reversed and a bright-line rule be adopted that warrantless naked-eye aerial observation is valid under the Fourth Amendment so long as the aircraft is operated where it lawfully may be.

A bright-line rule is sought because police pilots require one and because the courts require one. A host of cases have tested the constitutionality of aerial observations. Confusion exists in the courts as to the rules for helicopters, as most clearly shown by three recent totally contradictory California court decisions and by the decision below. That decision, while purporting to follow this Court's decision in *Ciraolo*, effectively held helicopters cannot be used to conduct aerial observations unless they fly at minimums required only of fixed-wing aircraft. Under that decision, helicopters, unlike fixed-wing aircraft, may not observe from places where they lawfully may be.

The decision below utilized bright-line rules, determining that aerial observations (i) from a helicopter flying below fixed-wing minimums, or (ii) as the result of a flight "targeted" on specific suspected property, are unconstitutional. Neither of these limiting bright-line rules withstands analysis and both should be rejected.

The decision also concluded that marijuana cultivating operations exposed to the open-air near a mobile home in which the cultivator resides (with a fence around the mobile home and out-buildings), all on an over-five acre tract, rented by the cultivator on a verbal lease constituted part of the curtilage. Florida submits this conclusion is in error, is contrary to the basic rationale of curtilage, and under *Ciraolo* is not the relevant issue.

ARGUMENT

Introduction

This case may be characterized in various ways. How one characterizes this case may well determine the result. Such a result is undesirable just because it is so potentially unpredictable.

This is, for example, a "helicopter case" and the Florida Supreme Court has concluded there is—for Fourth Amendment search purposes—a constitutional difference between airplanes and helicopters.

This is also a "drug case," the target of the aerial observation being suspected marijuana cultivating operations of Riley. That this case involves alleged illegal manufacture and possession of marijuana theoretically should hold no special significance for constitutional and analytical purposes under the Fourth Amendment. Yet, empirically, it seems no coincidence that most aerial observation cases do involve marijuana cultivation—and increasingly also involve greenhouses and functional near-equivalents.

This is also one of a growing number of "greenhouse cases," in which police may utilize aerial observations of the contents of sheds and like structures not viewable from the ground.

Above all, this case is about the legitimacy of asserted or perceived expectations (subjective and objective) of privacy in a world where air traffic is omnipresent.

Aerial surveillance is a new application of the broad constitutional principles behind the prohibition of warrantless search and seizure. First alluded to in *Oliver*

v. United States, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), this Court focused on the issue in *Ciraolo* and *Dow*.[7]

While the law reviews differ as to what factors ought to be taken into account, or are simply hostile to the idea of warrantless aerial surveillance altogether,[8] the academic search for meaningful criteria goes on.[9]

Florida submits this Court should now seize the opportunity afforded by this case to furnish the criteria by articulating suitably neutral Fourth Amendment principles governing police aerial observations in the light of *reasonable* expectations of privacy.

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7. Note, *Aerial Surveillance Withstands Fourth Amendment Scrutiny*, 23 Tulsa L. J. 259, 281 (Wint. 1987).

8. *See, e.g.*, Note, California v. Ciraolo, [106 S.Ct. 1809]: *The Demise of Private Property*, 47 La. L. Rev. 1365 (Jul. 1987); Note, *Search and Seizure—Aerial Surveillance—Administrative Inspections*—Dow Chemical v. United States, 106 S.Ct. 1819, 27 Nat. Resources J. 693 (Summ. '87).

9. *E.g.*, Note, *Constitutional Law—Search and Seizure—Warrantless Aerial Surveillance*—California v. Ciraolo, 106 S.Ct. 1809 (1986), 54 Tenn. L. Rev. 131 (1986); Note, *Criminal Procedure—Warrantless Aerial Surveillance Endorsed*—California v. Ciraolo, 9 Campbell L. Rev. 497 (1987); Note, *Eyes in the Sky, The Fourth Amendment in the Age of Aerial Surveillance*, 52 Mo. L. Rev. 507 (1987); Note, *Fourth Amendment —The Constitutionality of Warrantless Aerial Surveillance*—California v. Ciraolo, 106 S.Ct. 1809 (1986), 77 Sup. Ct. Rev. 602 (1986); Note, *In Plane View: Is Aerial Surveillance a Violation of the Fourth Amendment?*—California v. Ciraolo, 40 Sw. L. J. 1133 (1986).

I. WARRANTLESS NAKED-EYE AERIAL OBSERVATION IS PERMISSIBLE WHENEVER THE POLICE OBSERVER IS WHERE HE HAS A RIGHT TO BE.

A. *Ciraolo* Establishes The Rule That Warrantless Naked-Eye Aerial Observation From A Lawful, Public Vantage Point Is Constitutionally Permissible.

Ciraolo set the rule which governs this case, that an aerial observation by unaided vision violates no reasonable expectation of privacy:

> The touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). *Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? *See Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979).
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> . . . .
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> We turn, therefore, to the second inquiry under *Katz*, *i.e.*, whether that expectation is reasonable. In pursuing this inquiry, we must keep in mind that "[t]he test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity," but instead "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment."
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> . . . .

> That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. . . . "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, *supra*, 389 U.S., at 351, 88 S.Ct., at 511.
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> . . . . That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed.

Ciraolo, 476 U.S. 211-14, 106 S.Ct. at 1811-13, 90 L.Ed.2d at 215-17 (some case citations omitted).

The Florida Supreme Court acknowledged that, unlike fixed-wing aircraft which must fly in "navigable airspace," " '[t]he lawfully operated helicopter need stand back only such distance as not to hazard persons or property.' " J.A. 133, quoting *Sabo*, *supra*. That determination, had *Ciraolo* been accurately followed, would have compelled the opposite answer to the Fourth Amendment question than that which the Florida Supreme Court reached.

B. There Was Not And Could Not Be Any Reasonable Expectation Of Privacy From Naked-Eye Aerial Observation From A Lawful, Public Vantage Point.

There was only the barest evidence that Riley showed even a subjective expectation of privacy, the first prong of the *Katz* test. The incidents of privacy were (i) Riley's mobile home and greenhouse were within an over-five acre tract, (ii) a net wire fence extended around or partly around the mobile home and out-buildings, (iii) a "DO NOT ENTER" sign was posted, (iv) two of the sides of the greenhouse were closed, shrubbery partially covered a third, and the view of the fourth was obscured by the mobile home, and (v) most of the roof was covered. The first three items are merely physical facts or show an intent to exclude trespassers, not viewers. The last two are contradicted by the fact two sides of the greenhouse were not covered and were exposed to view (J.A. 32, 39), and there was enough uncovered space in the roof, as well as the two open-air sides, that one could see in with unaided aerial vision. J.A. 29, 31-32, 41.

If those facts suffice to show a subjective expectation of privacy from aerial observation, then this Court might as well say that prong is self-proving by bare-bones allegations. *See* J.A. 9, ¶ 9. In fact, this Court has expressed healthy skepticism of claims of subjective expectation on facts far more likely to corroborate such claims.[10]

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10. *E.g., Ciraolo, supra,* 476 U.S. at 211-12, 106 S.Ct. at 1812, 90 L.Ed.2d at 216 ("Whether respondent therefore manifested a subjective expectation of privacy from *all* observations

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But assuming the existence of subjective expectation, Riley could have had no reasonable *objective* expectation of privacy from warrantless naked-eye aerial observation, the second prong of the *Katz* test. Riley could not reasonably assume an observer from an aerial vantage point could not see in through the roof he built and which he did not fully cover, and through the two sides he chose not to close, so as to identify the 6-12 foot plants for what they were.

C. Law Enforcement Agencies And Courts Have A Need For A Bright-Line Rule Permitting Warrantless Naked-Eye Aerial Observation.

Both law enforcement agencies and the courts need a bright-line rule for permissible warrantless aerial observation.

The need for such rules with respect to the Fourth Amendment "search" clause for police on the beat—and in the air—has long been recognized. "[I]f police are to have workable rules, the balancing of interests . . . must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers."[11]

"Fourth Amendment protections can only be realized if the police are acting under a set of rules which, in most

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Footnote continued—

of his backyard, or whether instead he manifested merely a hope that no one would observe his unlawful gardening pursuits, is not entirely clear in these circumstances.") (emphasis in original).

11. *Michigan v. Summers,* 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). *Accord, e.g., New York v. Belton,* 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768, 773 (1981) (quoting LaFave, *"Case by Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma,* 1974 S.Ct. Rev. 127, 141-42).

instances, make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."[12] This is because:

> Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts, and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the officer in the field.

Belton, supra, 453 U.S. at 458, 101 S.Ct. at 2863, 69 L.Ed.2d at 773-74, *quoting* LaFave, *supra*, at 141.

The need for a bright-line rule as to warrantless aerial observation is equally clear for courts. For now, less than two years after this Court decided *Ciraolo*, the Florida Supreme Court, purporting to *follow Ciraolo*, has held a warrantless naked-eye observation from a helicopter in space where it lawfully could be to violate the Fourth Amendment. And the California courts, in seeking to follow *Ciraolo* in the context of helicopters, have only contradicted each other.[13]

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12. *Belton, supra*, 453 U.S. at 458, 101 S.Ct. at 2863, 69 L.Ed.2d at 773, *quoting* LaFave, *supra*, at 142.

13. See note 4, *supra*, and particularly *Sabo*, *supra*, which the decision below followed, and *Romo*, *supra*, which disagreed with just about everything the *Sabo* court said (and which the California Supreme Court also declined to review).

The courts have been deluged with cases involving aerial observations. The reported cases involve helicopters[14] as often as they do fixed-wing aircraft.[15] Certainly

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14. Reported helicopter cases include: *Giancola v. State of West Virginia Department of Public Safety*, 830 F.2d 547 (4th Cir. 1987); *United States v. Marbury*, 732 F.2d 390 (5th Cir. 1984); *United States v. Allen*, 675 F.2d 1373 (9th Cir. 1980), *cert. denied*, 454 U.S. 833, 102 S.Ct. 133, 70 L.Ed.2d 112 (1981); *NORML v. Mullen*, 608 F.Supp. 945 (N.D. Cal. 1985), *remanded*, 796 F.2d 276 (9th Cir. 1986), *amended*, 828 F.2d 536 (9th Cir. 1987); *People v. Messervy*, 175 Cal. App. 3d 243, 221 Cal. Rptr. 10 (Cal. 2d Dist. Ct. App. 1985); *People v. Roberts*, 195 Cal. App. 3d 479, 240 Cal. Rptr. 658 (Cal. 1st Dist. Ct. App. 1987); *People v. Superior Court for County of Los Angeles (Stroud)*, 37 Cal. App. 3d 836, 112 Cal. Rptr. 764 (Cal. 2d Dist. Ct. App. 1974); *People v. Sneed*, 32 Cal. App. 3d 535, 108 Cal. Rptr. 146 (Cal. 5th Dist. Ct. App. 1973); *Izzard v. State*, 10 Ark. App. 265, 663 S.W.2d 192 (Ark. Ct. App. 1984); *Randall v. State*, 458 So.2d 822 (Fla. 2d DCA 1984); *Masters v. State*, 453 So.2d 183 (Fla. 3d DCA 1984); *Brennan v. State*, 417 So.2d 1024 (Fla. 2d DCA 1982); *Murphy v. State*, 413 So.2d 1268 (Fla. 1st DCA 1982); *State v. Knight*, 63 Haw. 90, 621 P.2d 370 (1980); *State v. Stachler*, 58 Haw. 412, 570 P.2d 1323 (1977); *Commonwealth v. Beals*, 313 Pa. Super. 346, 459 A.2d 1263 (Pa. Super. Ct. 1983); *State v. Roode*, 643 S.W.2d 651 (Tenn. 1982); *State v. Layne*, 623 S.W.2d 629 (Tenn. 1981); *Goehring v. State*, 627 S.W.2d 159 (Tex. Crim. App. 1982); *State v. Fierge*, 673 S.W.2d 855 (Mo. Ct. App. 1984); *State v. Rogers*, 100 N.M. 517, 673 P.2d 142 (N.M. Ct. App. 1983); *People v. Abbott*, 105 A.D.2d 1029, 483 N.Y.S.2d 452 (N.Y. App. Div. 1984).

15. Reported fixed-wing aircraft cases include: *United States v. Bassford*, 601 F.Supp. 1324 (1985), *aff'd*, 812 F.2d 16 (1st Cir. 1987); *United States v. Mullinex*, 508 F.Supp. 512 (E.D. Ky. 1980); *United States v. DeBacker*, 493 F.Supp. 1078 (W.D. Mich. 1980); *United States v. Broadhurst*, 805 F.2d 849 (9th Cir. 1986); *People v. Cook*, 41 Cal. 3d 373, 221 Cal. Rptr. 499, 710 P.2d 299 (Cal. 1985); *People v. Stanulawski*, 180 Cal. App. 3d 748, 225 Cal. Rptr. 770 (Cal. 1st Dist. Ct. App. 1986); *People v. Smith*, 180 Cal. App. 3d 72, 225 Cal. Rptr. 348 (Cal. 1st Dist. Ct. App. 1986); *People v. Joubert*, 118 Cal. App. 3d 637, 173 Cal. Rptr. 428 (Cal. 5th Dist. Ct. App. 1981); *People v. St. Amour*, 104 Cal. App. 3d 886, 163 Cal. Rptr. 187 (Cal. 1st Dist. Ct. App. 1980); *Dean v. Superior Court for the County of Nevada*, 35 Cal. App. 3d 112, 110 Cal. Rptr. 585 (Cal. 3d Dist. Ct. App. 1973); *Diehl v. State*, 461 So.2d 157 (Fla. 1st

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there have been many more cases not reported. A bright-line rule will enable more expeditious judicial administration.

The need for a bright-line rule was implicitly recognized by the Florida Supreme Court. Its conclusion that Deputy Gell's warrantless naked-eye aerial observation violated the Fourth Amendment was based on its own bright-lines of "navigable airspace," "targeted" observations, and "curtilage." That none of these lines, or its conclusion, is correct does not diminish the need for a bright-line rule.

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DCA 1984); *Castello v. State*, 442 So.2d 990 (Fla. 1st DCA 1983); *Williams v. State*, 157 Ga. App. 476, 277 S.E.2d 923 (Ga. Ct. App.), *cert. denied*, 454 U.S. 823, 102 S.Ct. 108, 70 L.Ed.2d 95 (1981); *People v. Lashmett*, 71 Ill. App. 3d 429, 27 Ill. Dec. 657, 389 N.E.2d 888 (Ill. App. Ct. 1979), *cert. denied*, 444 U.S. 1081, 100 S.Ct. 1034, 62 L.Ed.2d 765 (1980); *Blalock v. State*, 483 N.E.2d 439 (Ind. 1985); *State v. Ryder*, 315 N.W.2d 786 (Iowa 1982); *State v. Davis*, 51 Or. App. 827, 627 P.2d 492 (Or. Ct. App. 1981), *petition denied*, 291 Or. 368, 634 P.2d 1346 (1981); *State v. Bigler*, 100 N.M. 515, 673 P.2d 140 (N.M. Ct. App. 1983); *State v. Farkes*, 71 Or. App. 155, 691 P.2d 489 (Or. Ct. App. 1984); *State v. Bruno*, 68 Or. App. 827, 683 P.2d 1383 (Or. Ct. App. 1984); *State v. Cord*, 103 Wash. 2d 361, 693 P.2d 81 (Wash. 1985); *State v. Cockrell*, 102 Wash. 2d 561, 689 P.2d 32 (Wash. 1984); *State v. Myrick*, 102 Wash. 2d 506, 688 P.2d 151 (Wash. 1984) (en banc).

The aircraft in question is apparently not specified in the following cases: *People v. Egan*, 141 Cal. App. 3d 798, 190 Cal. Rptr. 546 (Cal. 3d Dist. Ct. App. 1983); *Tuttle v. Superior Court*, 120 Cal. App. 3d 320, 174 Cal. Rptr. 576 (Cal. 5th Dist. Ct. App. 1981); *Burkholder v. Superior Court for County of St. Crews*, 96 Cal. App. 3d 421, 158 Cal. Rptr. 86 (Cal. 1st Dist. Ct. App. 1979); *Reece v. State*, 152 Ga. App. 760, 264 S.E.2d 258 (Ga. Ct. App. 1979); *State v. Havlat*, 222 Neb. 554, 385 N.W.2d 436 (1986); *State v. Daleganski*, 84 Or. App. 372, 734 P.2d 357 (Or. Ct. App. 1987); *Wellford v. Commonwealth*, 227 Va. 297, 315 S.E.2d 235 (1984); *State v. Grawien*, 123 Wis. 2d 428, 367 N.W.2d 816 (Wis. Ct. App. 1985).

D. The Bright-Line Rule As To Warrantless Naked-Eye Aerial Observation Should Permit The Police Observer To See Whatever May Be Seen So Long As The Observer Is Where He Has A Right To Be.

Florida submits the simple direct bright-line test for constitutionally permissible naked-eye warrantless aerial observation is that the police observer be where he or she is lawfully permitted to be. This rule should apply no matter what the aerial platform or vantage point.[16] Florida submits no greater or lesser test of the validity of the observation is constitutionally necessary.

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16. The rule for constitutionally permissible amplification of naked-eye observation is not presented and cannot be determined in this case. The attack of the court below on the observation here was *not* that it was secret and *not* that it was amplified, but rather that the observation was made at too low an altitude. This case is *not* "The Spy In the Sky," a domestic version of Gary Powers' U-2, or the satellite with startling powers of magnification. Although the teaching of *Dow, supra*, is that some degree of amplification is permissible (use of "floor mounted, precision aerial mapping camera, to take photographs of the facility from altitudes of 12,000, 3,000, and 1,200 feet" (476 U.S. at 230, 106 S.Ct. at 1822, 90 L.Ed.2d at 232), which could "discern equipment, pipes, and power lines as small as 1/2 inch in diameter," *Dow Chemical Co. v. United States*, 536 F.Supp. 1355, 1357 (E.D. Mich. 1982), *rev'd*, 749 F.2d 307 (6th Cir. 1984), *aff'd*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986)), the extent of permissible amplification is not there delimited. Presumably the issue posed by amplification is whether there is a reasonable expectation that one cannot, through amplification, "enter" a space the observer would not otherwise legally have a right to be. That that is the issue certainly would follow from *Katz*.

1. There Is No Principled Distinction Between Observation From Fixed-Wing Aircraft And Helicopters So Long As The Police Observer In Each Case Is Where He Has A Right To Be.

So long as the police observer is where he or she has a right to be, there is no principled distinction between observation from a fixed-wing aircraft and a helicopter. For the purpose of observing marijuana cultivating operations, either is simply a platform from which to look. One is constitutionally no better and no worse than the other. As the plethora of cases listed in notes 14 and 15, *supra*, shows, both have utility in law enforcement.

The Florida Supreme Court, taking its cue from *Sabo*, was inclined to the belief that all aerial observations are, inherently, "more susceptible to abuse and invasion of privacy" than ground observations. J.A. 130. But that court expressed further reservations about helicopters, specifically they are "particularly likely to unreasonably intrude upon private activities," and their "virtually unlimited maneuverability and observational capabilities" invade privacy, and, in addition, expressed its belief that one cannot "as easily" observe from a fixed-wing aircraft as from a helicopter. J.A. 130, 131, 133. Since none of these "inherencies" was predicated on any stated factual basis, Florida submits they have no credibility in Fourth Amendment interpretation. To find one type of platform objectionable while another is acceptable must be based on some factual predicate. Otherwise the distinction is not principled.

Fourth Amendment interpretation has required the objective reasonableness of the defendant's expectations

of privacy be interpreted in light of current technology. *See Katz, supra*. That the Framers could not have contemplated the advent of electronic eavesdropping does not make such activity immune from Fourth Amendment review. But technology which is generally known must itself condition the reasonableness of any expectation of privacy. The very fact that law enforcement agencies generally use both fixed-wing aircraft and helicopters is widely known. That the public generally has access to and broadly utilizes this technology for a host of purposes other than law enforcement must further condition (if not eliminate) privacy expectations relating to things seen by unaided vision from aircraft.[17]

That law enforcement agencies use both fixed-wing aircraft and helicopters does not mean their capabilities are identical. Helicopters have truly unique capabilities. *See, e.g.*, R. H. McGowan, *Police Helicopters*, 33 Air Beat 10 (Nov./Dec. 1987) (part 1 of 3) (Journal of the Airborne Law Enforcement Association).[18] It is just these

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17. It is axiomatic that "[t]he 'reasonableness' of any governmental intrusion is to be judged from two perspectives —that of the defendant, considering the degree and scope of the invasion of his person or property; that of the People, weighing the objective and imperative of governmental action." *Payton v. New York*, 445 U.S. 573, 580 n. 13, 100 S.Ct. 1371, 1377 n. 13, 63 L.Ed.2d 639, 647 n. 13 (1980), *quoting Payton v. State*, 45 N.Y.2d 300, 310-11, 408 N.Y.S.2d 395, 399, 380 N.E.2d 224, 229 (N.Y. App. Div. 1978), *rev'd and remanded, Payton, supra*.

18. The decision below observed, "[T]he [*Sabo*] court judicially noticed the unique capabilities of the helicopter as compared to fixed-wing aircraft" (J.A. 132), then proceeded to quote *Sabo* out of context for that exact proposition. *Id.* at 132-33. The decision below in fact, never did say what *Sabo* had actually judicially noticed: "We judicially notice the unique capabilities of the helicopter to gambol in the sky—turning, curtsying, tipping, hummingbird-like suspended in space, as-

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unique capabilities that make them indispensible to modern law enforcement. *E.g., id.*[19] Their uses are as varied as the agencies which use them.[20] The FBI, INS, DEA, Coast Guard, Border Patrol, Secret Service, and other federal law enforcement agencies' utilization of helicopters vary with specific agency missions.

If law enforcement does not combat crime by utilizing to the fullest at least that technology which is both visible and audible to its target (as is a helicopter), society will be overwhelmed by increasingly sophisticated criminals. "High-tech" marijuana cultivation in greenhouses is one example of this increasing sophistication.[21]

Footnote continued—

cending, descending and otherwise confounding its fixed-wing brethren doomed to fly straight, turn in caution and glidingly descend." *People v. Sabo*, 185 Cal. App. 3d 845, 230 Cal. Rptr. 170, 175 (Cal. 4th Dist. Ct. App. 1986), *cert. denied sub nom. California v. Sabo*, ___ U.S. ___, 107 S.Ct. 2200, 95 L.Ed.2d 855 (1987).

19. *See* Brief of *Amicus Curiae* Airborne Law Enforcement Association, Inc. filed this week in this case.

20. Police helicopters have been used for aerial surveillance operations since the late 1940s by the New York Police Department and the Los Angeles Sheriff's Department. *E.g.*, McGowan, *Police Helicopters, supra*, at 11. By the time of the Korean War, helicopters had undergone substantial evolutionary change. The Vietnam War dramatically underscored the helicopter's "new credentials as a multi-purpose tool—a tool that began to attract the attention of law enforcement." *Id.* "While there was considerable fad-buying [by police departments] of helicopters during the mid-1960s, it wasn't until the end of the decade that the era of police airborne patrols dawned." *Id.*

21. *See, e.g., Pot Growers Go Indoors, Officials Say*, Richmond (In.) Palladium - Item A7 (Mar. 27, 1988) (AP). "Marijuana growers are using sophisticated artificial lighting systems, scientific irrigation techniques, and up-to-date horticultural practices to boost their per-plant marijuana production and their odds of escaping surveillance by police in the air." *Id.*

The practical law enforcement issue at stake in this case is the degree to which we must surrender in the war on drugs. How the United States (including Florida) deals with marijuana cultivation in its own backyard (including what the Florida Supreme Court seemed to think was Riley's backyard) is of no small moment to a state like Florida, which is awash in illegal drugs.[22] In Florida's view, the United States and the several states have an obligation, consistent with constitutional requirements, to use helicopters and airplanes for just such aerial surveillance.[23]

The Florida Supreme Court, rather than engaging in reasoned analysis under the Fourth Amendment, simply injected pejoratives to castigate helicopters' use by law enforcement agencies. J.A. 132. To be sure there may be exceptions to the general bright-line rule urged here, in cases where police aerial observations are made in a deliberately harassing manner or, possibly, if there is physical intrusion.[24] But if abuse should occur in use of helicopters

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22. *A Domestic War, Too: Fight Against Drugs*, Miami Herald at 14A (Apr. 27, 1988) (editorial).

23. Florida, as one of the United States, has obligations to enforce this country's treaty obligations to eradicate drugs. *E.g.*, Single Convention on Narcotic Drugs, 1961, *Done at New York* March 30, 1961, *entered into force with respect to the United States*, June 24, 1967, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 151; Amendment to Single Convention on Narcotic Drugs, 1961, *Protocol done* March 25, 1972, *entered into force with respect to the United States*, Aug. 8, 1975, 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.N.T.S. 4.

24. While "it is certainly possible that helicopter surveillance could be unreasonably intrusive on account of interminable hovering, raising clouds of dust, creating unreasonable noise, and so forth, nothing in the record indicates that any such factor was present in this case." *California v. Sabo*, ___ U.S. ....., ..., 107 S.Ct. 2200, 2201, 95 L.Ed.2d 855, 856 (1987) (White, J., joined by the Chief Justice, dissenting from denial of certiorari). For other possible abuses of the general right to use aerial observations from legal vantage points, see *Giancola, supra*, 830 F.2d at 550-51; *NORML v. Mullen, supra;* and *United States v. Broadhurst, supra.*

for aerial observations, the abuse is visible. The helicopter is not a secret technology where neither its use nor abuse is generally known.

In any case, there is no showing of abuse here. Despite the Florida Supreme Court's references to "hovering," the helicopter circled the greenhouse only twice. There is no indication it disturbed Riley's property in any fashion.[25] Neither is there any indication in the record of any other conduct which might be deemed harassing.

2. None Of The Specific Limitations Suggested By The Florida Supreme Court on Aerial Observation Has Any Constitutional Significance.

In addition to its general objection to helicopters, both as *a* platform of aerial observation and as *a different* platform of aerial observation, the Florida Supreme Court objected to helicopter use on the bases that the observation was from too low an altitude and was the result of a "targeted" flight, *i.e.*, a flight *to* the airspace over Riley's property to look through the open roof panels and open sides of his greenhouse at his 6-12 foot high marijuana plants.

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25. This flight was at 400 feet. In *Giancola v. State of West Virginia Department of Public Safety*, 830 F.2d 547 (4th Cir. 1987), the plaintiff claimed "the helicopters flew over his property . . . at an altitude of 100 feet" but "admitted that the wind generated by the rotors did not disrupt anything on the ground." 830 F.2d at 548. This suggests why a flight at 400 feet could not create any hazard to persons or property on the surface.

a. Any Limitation on Helicopter Observation Based On Definitions Of "Navigable Airspace" Is Irrational.

The first of the two specific objections raised by the Florida Supreme Court was that the helicopter here flew below the level at which a fixed-wing airplane may lawfully fly. That is incontestible, but it is equally incontestible the pilot was where he lawfully could be. *E.g.*, 14 C.F.R. § 91.79(d); *accord*, J.A. 133.

The Florida Supreme Court held the helicopter here flew outside of (that is, below) "navigable airspace." This phrase comes from 49 U.S.C. § 1304, which provides, in relevant part, "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through navigable airspace of the United States."[26]

The decision below (and the California court *Sabo* decision on which it relied) put great store in the fact that the aerial observation upheld in *Ciraolo* and *Dow* was performed in "navigable airspace." The decision below introduced this concept through the back door: the helicopter here was assertedly in "non-navigable" airspace, which is then defined, and shown for that reason to fall outside the ambit of *Ciraolo* and *Dow* (*i.e.*, as a matter of constitutional law). Hence, after noting the facts in *Sabo* were "nearly identical to those here," (J.A. 131-32), the decision below observed, "Noting that helicopters may lawfully be operated in nonnavigable airspace, the [*Sabo*] court concluded that such *lawful* operation did not fall within the aerial surveillance approved

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26. 49 U.S.C. § 1301(29) and 14 C.F.R. § 91.79 are set forth in text, *supra*.

in *Ciraolo* and *Dow Chemical*." J.A. 132 (emphasis added).

In an accompanying, explanatory footnote the Florida Supreme Court explained the statutory and regulatory source for the *Sabo* distinction:

> The *Sabo* court relied on federal law defining navigable airspace as that airspace above the minimum altitudes of flight prescribed by the regulations of the Civil Aeronautics Board. 49 U.S.C. §§ 1304, 1301(29). The minimum altitude for a fixed wing aircraft is 1,000 feet over a congested area and 500 feet over a noncongested area. 14 C.F.R. § 91.79(b) & (c) (1986). Helicopters may be lawfully operated at less than minimum altitudes, and therefore below navigable airspace, so long as the operation is conducted "without hazard to persons or property on the surface." 14 C.F.R. Section 91.79(d) (1986). 230 Cal. Rptr. at 174-75.

J.A. 132 n. 10.

For purposes of argument, we may assume the threshold premise that "navigable airspace" is, as a matter of grammar, always above the minimum altitude, since federal statute declares " 'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in takeoff and landing of aircraft." 49 U.S.C. § 1301(29). Since a helicopter, unlike an airplane, has no fixed minimum altitude under the regulations construed in the decision below, a helicopter will always be doomed under this reading to fly in nonnavigable airspace unless it happens to fly at altitudes where airplanes (but not helicopters) are required to fly.

Ciraolo and *Dow* mentioned the phrase "navigable airspace" in the course of stating where the fixed-wing aircraft there involved were located. Since fixed-wing aircraft must fly in "navigable airspace" they were in a place where they had a lawful right to be and the relevance of "navigable airspace" to those cases was establishing the lawfulness of the placement of the vantage point there.

Simple analysis of the regulations considered in the decision below shows they cannot and do not apply to helicopters. Title 14 C.F.R. § 91.79(d) explicitly states that helicopters may be operated at less than the minimum altitudes otherwise prescribed "if the operation is conducted without hazard to persons or property on the surface." Further, 14 C.F.R. § 135.203 provides:

> Except when necessary for takeoff and landing, no person may operate under VFR— . . . (b) A helicopter over a congested area at an altitude less than 300 feet above the surface.

It is thus not a case of the FAA regulations ignoring helicopters. Rather the regulations set safety rules for where helicopters may lawfully be which are different than those set for fixed-wing aircraft, presumably to reflect the different characteristics of the two kinds of aircraft.

There is thus no structural basis for an "altitude" test. Neither is there any evidence (or allegation) that this helicopter violated the FAA prohibition against creating a surface hazard to person or property. The helicopter here being where it was legally entitled to be, *Ciraolo's* public vantage point test was met.

b. Any Limitation On Aerial Observation Based On Whether The Observation Is Purposeful, "Targeted" On A Specific Destination As Opposed To Casual, Has No Legal Basis.

The second of the two specific objections raised by the Florida Supreme Court was that this helicopter flight was not "casual" but was "purposeful" ("targeted") on Riley's greenhouse.[27] A "casual" flight presumably is one for a purpose other than observance of crime, such as traffic patrol (albeit some cases refer to a "routine patrol" and "routine flyovers" to mean something else again). If this distinction, suggested by the dissenting opinion in *Ciraolo*[28] as having significance, were applied in a rural area (such as that part of Pasco County, Florida here involved), then little police aerial observation would be possible, there being little traffic to patrol.

No decision of this Court validates different treatment of "purposeful" observations and observations made during "casual" patrols. *Ciraolo* flatly rejected the distinction.

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27. The Florida Supreme Court distinguished from the "purposeful" flight (J.A. 130) the aircraft "casually flying over the area," (J.A. 133) citing the decision in "*Ciraolo*, 106 S.Ct. at 1813." *See* J.A. 133. This phrase may be derived from the words "[a]ny member of the public flying in this airspace who glanced down." At note 2 on that page, the *Ciraolo* court distinguished between "a 'routine patrol'" and "'focused' observations," addressing the dissent's argument that the former is constitutionally permissible and the latter not with respect to curtilage, and rejecting that argument. Florida here interprets the words "casual" and "routine" to be essentially the same; likewise Florida treats "purposeful," "focused," and "targeted" to be synonymous.

28. *See generally Ciraolo, supra*, 476 U.S. at 215, 106 S.Ct. at 1814, 90 L.Ed.2d at 218 (1986) (Powell, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting).

Nor does logic validate a distinction between the two kinds of observation. The Florida Supreme Court raised this bright-line ("purposeful" as opposed to "casual") in the context of Riley's objectively reasonable expectations of privacy. But from the viewpoint of Riley's expectations, why the aircraft appeared overhead seems irrelevant. As *Ciraolo* observed,

> Whether this is a rational distinction is hardly relevant, although we find difficulty understanding exactly how respondent's expectations of privacy from aerial observation might differ when two airplanes [or two helicopters] pass overhead at identical altitudes, simply for different purposes. We are cited to no authority for this novel analysis or the conclusion it begat. The fact that a ground-level observation by police "focused" on a particular place is not different from a "focused" aerial observation under the Fourth Amendment.

Ciraolo, supra, 476 U.S. at 214 n. 2, 106 S.Ct. at 1813 n. 2, 90 L.Ed.2d at 217 n. 2 (brackets added).

Certainly a "purposeful" observation is more likely to have a successful result than the casual one. One is likely to be inclined to see that which one is focusing on more readily than something one observes merely in passing.[29]

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29. Florida does *not* concede here, even for purposes of argument, that "the details observed here. . ." (J.A. 133), could not just as easily have been discerned by any person casually flying over the area in a fixed-wing aircraft. There are three reasons for this refusal: First, because the 6-12 foot marijuana plants were conspicuous through the gaping holes left by missing panes in the roof of the greenhouse and through the open-air sides; Second, because there is no evidence in the record of any hovering, it is highly probable that a fixed-wing aircraft at 100 feet higher altitude (assuming the rural "noncongested area" minimum altitude of 500 feet would have applied) would have seen the same things the helicopter observer saw from 400;

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But that tells us very little. If, on a "casual" flight the passing gaze of a policeman comes upon a greenhouse with part of its roof and two of its sides open to the air, assuredly he will "target" his gaze on the exposed interior. Does this "targeting" of gaze make the observation unlawful? To answer in the affirmative would deny, and destroy, reality. The distinction simply has no logical, or constitutional, basis.[30]

c. Concepts Of Curtilage Have Little Relevance to Aerial Observations And In Any Case Should Not Constitute A General Limitation On Them.

Whatever its relevance, the Florida courts operated on the assumption the greenhouse was part of Riley's curtilage and supported their conclusion that Riley showed a subjective expectation of privacy from warrantless aerial observation by reference to curtilage. Riley recently went so far as to claim curtilage "completely remove[s] the case *sub judice* from the situation in *Ciraolo*."[31]

Footnote continued—

Third, an officer as equally experienced as Deputy Gell in a fixed wing aircraft flying even at 1,000 feet in an equally targeted flyover probably also could have seen the 6-12 foot plants below and recognized the plants for what they were. *Cf., e.g., Blalock, supra,* 482 N.E.2d 439, 441, 443 (where police in airplane saw marijuana through translucent roof of greenhouse from 800-1000 feet; "plane was being used for routine flyovers of [rural c]ounty to detect marijuana crops.").

30. "That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant." *Ciraolo, supra,* 476 U.S. 207, 106 S.Ct. at 1813, 90 L.Ed.2d at 217.

31. Respondent's Brief in Opposition to Petition for Certiorari (at 8), *Florida v. Riley,* ..... U.S. ....., 108 S.Ct. 1011, 98 L.Ed.2d 977 (1987). On the other hand, in his brief in

(Continued on following page)

The relevance of curtilage to *aerial* observation is dubious. *Ciraolo* ignored the suburban backyard (fully and immediately fenced, containing a swimming pool and sundeck), and determined the issue is what the eye can observe, not the place observed.[32] Its existence in this case is, at best, problematical. The fact patterns in the various cases (including all those listed in notes 14 and 15, *supra*) and the economics of marijuana production in the United States, show the relatively small production units of such cultivating operations cannot obscure their business nature. The norms associated with the sanctity of the home and the legitimacy of an assertion of privacy expectations surely do not obtain in modern commercial farming (whether cattle, citrus, dairy, or marijuana).[33] The core of the Framers' agrarian context of hearth and home in protecting the curtilage at common law surely did not extend to the kind of greenery at

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Footnote continued—

the *Florida* Supreme Court, Riley described the "aerial search" here as being "very similar" to that in *People v. Ciraolo,* 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93 (Cal. 1st Dist. Ct. App. 1984), *rev'd, Ciraolo, supra.* Brief of Petitioner (at 6), *State v. Riley,* 511 So.2d 282 (Fla. 1987).

32. As the dissenters in *Ciraolo* there pointed out, "The Court omits any reference to the fact that respondent's yard contained a swimming pool and a patio for sunbathing and other private activities. At the suppression hearing, respondent sought to introduce evidence showing that he did use his yard for domestic activities. The trial court refused to consider that evidence." *Ciraolo, supra,* 476 U.S. at 222 n. 7, 106 S.Ct. at 1817 n. 7, 90 L.Ed.2d at 222 n. 7 (Powell, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting) (record citation omitted).

33. Cultivation of crops is not an intimate activity of the kind protected by the Fourth Amendment. "There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields." *Oliver v. United States,* 466 U.S. at 179, 104 S.Ct. at 1741, 80 L.Ed.2d at 222.

stake here. The box row hedges of Williamsburg and Gunston Hall and the humble ramshackle scrapple of a prairie garden where the pioneer woman raised vegetables for truly "domestic" consumption—and the privacy expectations thereto attached—have nothing to do with marijuana production for profit.

The latest decision of this Court bearing on curtilage is *United States v. Dunn*, ... U.S. ....., 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987)[34] and application of *Dunn's* four-part test to this "greenhouse"[35] casts grave doubt on characterization of it as curtilage. This case involves an over-five acre parcel rented on a verbal lease, having a (probably incomplete) net wire fence around the mobile home and out-buildings. The greenhouse for marijuana cultivating operations was built by the cultivator, who resided nearby in a mobile home. Facially, these facts would suggest a business enterprise tended by its operator and manager, who lived on the business premises. Although the operation was of a cottage industry type, no less is it a business.

Further as Justice Scalia, concurring in *United States v. Dunn*, noted, "What is significant is that the barn was *not* being so used [for intimate activities of the home], whether or not the law enforcement officials knew it."[36]

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34. While the Florida Supreme Court cited Justice Brennan's dissent in *United States v. Dunn*, ... U.S. ....., ..., 107 S.Ct. 1134, 1142, 94 L.Ed.2d 326, 338 (1987), it did not mention or consider this Court's opinion nor Justice Scalia's concurrence.

35. It is not even clear the exposed-to-the-air-on-two-sides shed rises to a dictionary definition of a "greenhouse."

36. *United States v. Dunn*, ... U.S. ....., ..., 107 S.Ct. 1134, 1141, 94 L.Ed.2d 326, 337 (1987) (Scalia, J., concurring) (emphasis and brackets added) (original context preserved).

E. Neither The Framers' Constitution, Justice Harlan's Constitution, Nor The "Living Constitution" Prohibits The Articulation Of The Requested Bright-Line Rule.

As this Court has often explained, "Earlier [*i.e.*, pre-*Katz*] law had focused on the physical invasion of the individual's person or property interests in the course of a seizure of tangible objects."[37] Given the Framers' view of physical invasions, the Framers would have presumably had no theoretical objection to warrantless naked-eye aerial observation—no matter what the airborne vehicle.

Under our "Living Constitution" concepts of "trespass" and Fourth Amendment interpretation have diverged. This Court has found no violation of the Fourth Amendment even where a trespass is concerned. *E.g., Oliver v. United States, supra*. Similarly, this Court found, in *Katz*, that even where no trespass had occurred, there still may be a Fourth Amendment violation. *Katz*, of course, stretched "the prohibitions of the [Fourth] Amendment . . . to protect against invasion by electronic eavesdropping of an individual's privacy in a phone booth not owned by him."[38]

For two decades Justice Harlan's seminal concurrence in *Katz* has been the foundation of Fourth Amendment thinking and scholarship. There is now an intellectual

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37. *E.g., Payton, supra*, 445 U.S. at 591 n. 33, 100 S.Ct. at 1382 n. 33, 63 L.Ed.2d at 654 n. 33 (citing *Olmstead v. United States*, 277 U.S. 438, 466, 48 S.Ct. 564, 72 L.Ed.2d 944 1928)). There is no suggestion here that any invasion of any physical property of Riley here occurred, nor could there be.

38. *Payton, supra*, 445 U.S. at 591 n. 33, 100 S.Ct. at 1382 n. 33, 63 L.Ed.2d at 654 n. 33 (citing *Katz, supra*).

struggle among proponents and opponents of warrantless aerial observation to claim his concurring opinion vindicates one position or the other. The Florida Supreme Court decision here is one more such case. *Ciraolo* likewise purports to follow *Katz*, although it reaches the opposite historical conclusion from the decision below, and in terms far more persuasive. Perusal of Justice Harlan's concurring opinion in *Katz* confirms the *Ciraolo* majority's reading thereof:

> The dissent contends that the Court ignores Justice Harlan's warning in his concurrence in *Katz v. United States*, 389 U.S., at 361-362, 88 S.Ct., at 516-517, that the Fourth Amendment should not be limited to proscribing only physical intrusions onto private property. *Post*, at 215-216. But Justice Harlan's observations about future electronic developments and the potential for electronic interference with private communications, see *Katz, supra*, at 362, 88 S.Ct., at 517, were plainly not aimed at simple visual observations from a public place. . . .
>
> Justice Harlan made it crystal clear that he was resting on the reality that one who enters a telephone booth is entitled to assume that his conversation is not being intercepted. This does not translate readily into a rule of constitutional dimensions that one who grows illicit drugs in his backyard is "entitled to assume" his unlawful conduct will not be observed by a passing aircraft—or by a power company repair mechanic on a pole overlooking the yard. . . .
>
> . . . .
>
> One can reasonably doubt that in 1967 Justice Harlan considered an aircraft within the category of future

> "electronic" developments that could stealthily intrude upon an individual's privacy.

Ciraolo, supra, 476 U.S. at 214-15, 106 S.Ct. at 1813, 90 L.Ed.2d at 217-218.

Helicopters have been in use since the first quarter of this century and have been in active law enforcement and police aerial observation use since the 1940s. There is then no plausible way to claim *Katz* or Justice Harlan's concurrence therein remotely cast into doubt the general constitutionality of police warrantless aerial observation. Analysis in terms of a "Living Constitution" likewise permits a bright-line test for permissible warrantless naked-eye aerial observations.

CONCLUSION

For the foregoing reasons, the decision of the Florida Supreme Court should be reversed and the cause remanded to the Florida courts for further proceedings.

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